Supreme Court, U. S.
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No. 80-578
IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Appellant,

vs.

MARY LEE MILHAN,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

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Of Counsel:
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RESPONDENT'S BRIEF IN OPPOSITION.

The respondent, the former Mary Lee Milhan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 27 Cal.3d 765.

Opinion Below.

Attached as Exhibit "A" is the California Superior Court decision which was subject to review in the California Supreme Court opinion. Attached as Exhibit "B" are the Findings of Fact and Conclusions of Law issued in connection with that judgment.

Statement of the Case.

In this case, petitioner Harry Lloyd Milhan ("husband") petitions for writ of certiorari following the second of two California Supreme Court opinions and judgments in this case.

The first opinion reversed a trial court judgment and in doing so, held that husband's Navy retired pay was divisible under California community property laws and that an offsetting award of other community property could be made for the cash value of certain military life insurance policies. *In re Marriage of Milhan,* 13 Cal.3d 129, 528 P.2d 1145 (1974). Following the entry of judgment caused by the filing of the California Supreme Court's remittitur to the trial court, husband petitioned for certiorari.

Certiorari was denied by this Court following that first judgment. (*In re Marriage of Milhan,* 421 U.S. 976 (1975).)

During the pendency of subsequent proceedings before the trial court for restitution of back amounts of retired pay and related matters, husband became entitled to disability pay in lieu of a corresponding amount of retired pay. Husband raised the issue of disposition of his disability pay at that time. After the trial court entered its judgment and while that judgment was on appeal, this Court issued its decision in *Hisquierdo v. Hisquierdo,* which prompted husband to raise the issue of federal preemption.

The California Supreme Court carefully analyzed and rejected husband's preemption arguments in its opinion reported at 27 Cal.3d 765.

Husband and wife were married during the entire 20 years of husband's military service. During many of those years they resided in California. After husband retired from the military, he and wife moved to California and established

permanent residence and domicile. The parties' marriage was dissolved five years after Mr. Milhan retired from the Navy and began receiving military retired pay.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. This Court Has Previously Denied Certiorari to the Petitioner on a Judgment Deciding Two of the Three Same Questions Presented in This Petition. The Prior Judgment Was Final and Was Res Judicata on Those Issues.

Two of the three issues involved in the petition were decided in a prior final judgment in the proceedings between the parties. In the 1972 trial court judgment, Petitioner Harry Lloyd Milhan (the husband) was awarded as separate property his retirement pension and two military insurance policies which had been purchased with community funds. The California Supreme Court reversed that judgment in *In re Marriage of Milhan*, 13 Cal.3d 129, 528 P.2d 1145 (1974). On January 16, 1975, the Supreme Court's remittitur was filed with the Superior Court. It is submitted that that judgment created by the filing of the remittitur was a final judgment as to those issues. In fact, the California Supreme Court in the opinion from which husband has petitioned, states:

> "[T]he remittitur in this case [following the first Supreme Court Decision] in effect ordered the trial court to enter judgment in Mrs. Milhan's favor on the contested items of property. The filing of this remittitur, in accordance with Code of Civil Procedure section 912, fully defined and protected the rights of the parties. (Citation omitted.) The trial court had only to apply equitable principles governing the *enforcement* of these rights. Accordingly, the filing of the remittitur constituted the entry of judgment for purposes of determining the date from which interest may run. (Citations omitted.)" (*In re Marriage of Milhan*, 27 Cal.3d 779. Petition Appendix "A", p. 14.)

Consequently, the Court's first judgment was final on the issues of the property disposition of the Navy retired pay and the disposition of husband's military insurance policies and was res judicata.[1]

Husband petitioned to this Court for certiorari from that first judgment and stated that he was petitioning to "review the final judgment of the Superior Court of the State of California entered on January 16, 1975, pursuant to a decision and order of the Supreme Court of the State of California." (Petition for Writ of Certiorari, by Harry Lloyd Milhan dated March 17, 1975, no. 74-1177.)

Wife respectfully requests that the Court take judicial notice of this record of the U.S. Supreme Court.

The judgment addressed by the California Supreme Court in its second decision was a formal judgment incorporating the terms of the first judgment which was created by the filing of the remittitur and also dealt with subordinated issues regarding enforcement.[2] The issue of the divisibility of hus-

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[1]Under California Law,

" 'The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.' (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 [122 P.2d 892].) The same rule applies to final adjudications rendered in the course of a divorce proceeding over which a court may have continuing jurisdiction and which may require several orders for its ultimate disposition." (*Wodicka v. Wodicka* (1976) 17 Cal.3d 181, 188.)

[2]The California Supreme Court opinion states in a footnote:

> "Mrs. Milhan's contention that the decision in Milhan I is the final law of the case is incorrect inasmuch as *Hisquierdo* was decided while the appeal herein was pending. (See *Subsequent Injuries Fund v. Ind. Acc. Com* (1960) 53 Cal.2d 392, 395 [348 P.2d 193].)" (*In re Marriage of Milhan*, 27 Cal.3d at p. 771, fn. 4.)

However, the opinion, after much analysis, determines that there has in fact been no change in law which would affect the prior judgment. Consequently, the case cited, *Subsequent Injuries Fund*, is inapplicable. That case held that an exception to the doctrine of law of the case arises when there has been a change in law since the former appellate decision, which change would result in defeating a just cause if law of the case were strictly followed.

band's disability pay which he had converted from retired pay was first addressed by the trial court after the filing of the remittitur and before it entered its formal judgment. That issue alone was not res judicata from the prior judgment.

Consistent with that effect, husband did not argue in the trial court that federal law preempted the disposition of the retired pay and disposition of the insurance policies. He did argue that the disability pay was husband's separate property.

The only way one could conclude that the 1975 judgment was final for the purpose of Supreme Court review and that the 1980 judgment was likewise final would be to view the first judgment as being final as to the two issues it addressed and the recent judgment as being final as to the new issue only, the disposition of husband's disability pay.

In *Rio Grande Western Railway Co. v. Stringham* (1915) 239 U.S. 44, the Supreme Court held that only the first of two judgments could be reviewed by the U.S. Supreme Court. Like this case, that case involved two judgments; the first judgment directed the lower court to enter a certain judgment and the second judgment resulted from that action. The Court reasoned that the first judgment disposed of the case on the merits. In directing that judgment should be entered, it left nothing to the judicial discretion of the trial court. Consequently, the writ of error addressed to the second judgment presented nothing reviewable for the U.S. Supreme Court.

Similarly, in this case the first judgment entered following the first Supreme Court decision directed entry of judgment and "fully defined and protected the rights of the parties."

(*In re Marriage of Milhan*, 27 Cal.3d at p. 779.) The second judgment should not be subject to review.[3]

2. The Decision Is Correct.

In this case, the California Supreme Court has carefully analyzed the treatment under its community property system of Navy retired pay, disability pay received in lieu of retirement pay, and military life insurance policies in light of the statutes governing those benefits and this Court's decision in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572.

The principal economic asset involved in this case is Navy retired pay. As the opinion ably states, neither of the statutory provisions found to be indicative of federal preemption in *Hisquierdo* exists for Navy retired pay. As to the first of these two elements, no federal statute protects Navy retired pay from attachment, garnishment, assignment and other legal process as protects railroad retirement benefits. (45 U.S.C., §231m.)

As to the second of these, the statutes governing Navy retired pay do not create a separate benefit for the nonmilitary spouse that is terminated on dissolution of marriage as exists for railroad retirement benefits. (45 U.S.C., §231d(c)(3).) Navy retired pay does not have this combi-

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[3]In husband's statement of the case, he makes reference to objections being raised throughout the trial court proceeding, but does not state that he continued to argue that the disposition of the Navy retired pay and federal insurance policies was precluded by federal law. Consequently, wife was never required to argue collateral estoppel in that proceeding because the basic issues decided in the prior judgment were not in dispute. Wife did maintain throughout that the entry of the remittitur constituted entry of the judgment. Only when the judgment was on appeal and the U.S. Supreme Court had issued its *Hisquierdo* decision did husband raise federal preemption arguments which had lain dormant since the final judgment in 1975. When this issue was raised in the Court of Appeal, wife strenuously objected that husband was attempting an impermissible collateral attack on the first judgment of January 16, 1975.

nation of statutory elements found so critical in *Hisquierdo;* in fact, it has neither of them.

The statutory provisions husband cites are those dealing with elective annuity plans which are distinct from the benefits in question here and which do not, in any case, create a spousal benefit designed to reflect the contribution of military spouses to the marital community.

As is evident from the California Supreme Court's opinion, the statutes creating and defining Navy retired pay contain no provision which indicates an intent of Congress to prevent community property states from including that property in the fabric of its community property system. In fact, to remove it from the community property system would do substantial harm to it. (See *United States v. Yazell,* 382 U.S. 341 (1966).)

In the absence of any statutory provisions evidencing a federal intent to preempt on Navy retired pay, it cannot be maintained here that "Congress has 'positively required by direct enactment' that state law be preempted." (*Hisquierdo, supra,* 439 U.S. at 581 (citation omitted).)

California has adhered to the *Hisquierdo* decision. It has recently held social security benefits to be nondivisible.[4]

The decision in this case is also fair and consistent with California's community property system under which all community assets and debts are divided equally upon dissolution of marriage. Since military retired pay is often the principal asset when parties' marriage is dissolved, a contrary decision could leave husband with the entire value of

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[4]*In re Marriage of Hillerman,* 109 Cal.App.3d 334 (1980); *In re Marriage of Cohen,* 105 Cal.App.3d 836 (1980). *Hisquierdo* noted the many parallels between social security and railroad retirement pay including the fact that the larger tier of benefits under the Railroad Retirement Act corresponds exactly to those under Social Security. (439 U.S. at 575.)

that asset, leaving wife with no corresponding asset and possibly leaving wife subject to the continuing obligation for one-half of the parties' debts.[5] Moreover, if the wife was able to accrue rights in a private pension during her marriage, husband would receive half of the wife's pension plus the right to all of his Navy pension.

This Court's decision in *Hisquierdo* was not a departure from a long standing treatment of railroad retirement pay as a community asset in community property jurisdictions prior to that decision. There was no such long standing treatment of that asset in the community property jurisdictions.[6]

Unlike railroad retirement pay, military retired pay has received uniform treatment as a community asset in community property states. There is no conflict of authorities on this issue among the community property states. Every community property state that has addressed the issue has held military retired pay to be community property divisible

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[5]The inequity is aggravated in a community property jurisdiction such as Texas where alimony is prohibited as being against public policy. (*Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Texas S.Ct. 1979) (denying wife alimony and granting husband Railroad Retirement benefits).)

[6]Texas: *Allen v. Allen*, 363 S.W.2d 312, 314 (Tex. Civ. App. 1962) (railroad pension held nondivisible) cf. *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Texas S.Ct. 1979) (post *Hisquierdo*) (held nondivisible, reversing contrary pre-*Hisquierdo* Court of Appeal decision).

Washington: *Heuchan v. Heuchan*, 228 P.2d 470 (1951) (support collection action indicates railroad retirement had not been divided on divorce).

upon dissolution of marriage.[7] Countless judgments have been entered on this basis. One cannot minimize the profound disruption a contrary ruling would cause for these states' community property systems.

3. The Issues Presented by This Case Are Distinguishable From Those Before the Court in McCarty v. McCarty, No. 80-5, and This Case Should Not Be Governed by Any Decision in That Case.

This case differs from *McCarty v. McCarty* in both the questions presented and the applicable law. *McCarty v. McCarty*, No. 80-5,[8] is a case in which the constitutionality of the California code section governing the division of quasi-community property is challenged. (Calif. Civ. Code, §4803.) The trial court judgment in this case characterizes husband's Navy retired pay as the parties' community prop-

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[7] *e.g.*, California: *In re Marriage of Milhan*, 27 Cal.3d 765 (1980); *In re Marriage of Milhan*, 13 Cal.3d 129 (1974), cert. denied 421 U.S. 976; *In re Marriage of Fithian*, 10 Cal.3d 592 (1974), cert. denied 419 U.S. 825, rehearing denied 419 U.S. 1060; Idaho: *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho S.Ct. 1975); Louisiana: *Moon v. Moon*, 345 So.2d 168 (Ct. App. 1977); Washington: *Morris v. Morris*, 419 P.2d 129 (Wash. S.Ct. 1975); Arizona: *Czarnecki v. Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 (1979) (post *Hisquierdo*); New Mexico: *Stephens v. Stephens*, 595 P.2d 1196 (S.Ct. 1979); Texas: *Busby v. Busby*, 457 S.W.2d 551 (Texas 1970); *Cearley v. Cearley*, 544 S.W.2d 661 (Texas 1976); *cf. Ex Parte Johnson*, 591 S.W.2d 453 (Texas 1979) (disability pay from Veterans Administration held nondivisible; husband not entitled to longevity retirement); *Perez v. Perez*, 587 S.W.2d 671 (Texas 1979) (military readjustment benefits held nondivisible, distinguished from military retired pay); Nevada apparently has not addressed the issue.

[8] Probable jurisdiction of appeal under 28 U.S.C. §1257(2) reportedly noted by U.S. Supreme Court on November 10, 1980.

erty.[9] Husband did not object to or contest that characterization. Likewise, the question presented in husband's petition for certiorari is "whether federal military retired pay is community property subject to division with a non-military ex-spouse upon dissolution of marriage."

This case poses the question whether Navy retired pay may be divided as community Property, not whether California's quasi-community property statute can be applied where the military spouse is on active duty and denies California domicile.

The husband in *McCarty* argues that the anti-assignment and anti-anticipation provision in 37 U.S.C. §701 is the statutory parallel to the Railroad Retirement Act's anti-assignment provision (45 U.S.C. §231m). That statute (§701) clearly relates only to the assignment of pay of the members of the Army and Air Force. In stark contrast to that section is 37 U.S.C. §702,[10] which specifically permits Navy officers to make allotments of their pay without restricting the recipients or purposes.

In short, any inference that 37 U.S.C. §701 indicates a Congressional intent to shield Army pay from assignments

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[9]California Civil Code section 5105 states that:

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

Under Civil Code section 4803, quasi-community property is property acquired by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition.

[10]"The Secretary of the Navy, under regulations prescribed by him, may permit an officer of the Navy or Marine Corps to make allotments of his pay —

(1) For the support of his family relatives;
(2) For his own savings; or
(3) For other purposes."

is specifically negated for Navy pay as section 702 specifically authorizes making pay allotment for unrestricted purposes.

McCarty deals with division of Army retired pay which was not vested at the time of divorce and which involved an active military member who disputed his California domicile. The facts in this case are distinctly different; it involves a husband and wife whose marriage was dissolved five years after the husband had retired from the Navy and had started receiving his Navy retired pay. California's jurisdiction over the parties was unquestioned as both husband and wife had resided in and been domiciled in California before a petition was filed for the dissolution of their marriage.

Any arguments made in *McCarty* about the necessity for uniform state law disposition of military assets because of the mobility of the service population are completely irrelevant in this case. It would be specious to contend that after the husband left the Navy the non-military spouse (the wife in this case) could or did somehow force the ex-military spouse (husband) to move to a state with favorable marital property laws in case they became divorced.

In a case like *McCarty*, the military spouse has the ability to keep his domicile in the state of his choice, thereby affecting the jurisdiction of the state in which the couple resides. Under California law, both parties must be domiciled in California for it to divide their quasi-community property. *Addison v. Addison* (1965) 62 Cal.2d 558, 399 P.2d 897. Consequently, for military personnel who keep their domicile elsewhere there is not a serious threat of California exercising its jurisdiction over those parties who are in the state "involuntarily." It should be noted that the wife of a military employee generally does not have the same ability to declare a different domicile as the husband has and consequently, if anyone is adversely affected by the

jurisdictional aspects of the transience of military life, it is the non-military wife, not the husband.

The California Supreme Court's opinion in this case is scrupulously attentive to the guidance this Court has given in *Hisquierdo* in analyzing the issue of federal preemption. It is also consistent with a long line of cases in community property jurisdictions dividing military retired pay which this Court has permitted to stand. So, too, does this case deserve to stand.

Conclusion.

For the reasons articulated above, the petition for writ of certiorari should be denied.

November 25, 1980.

Respectfully submitted,

JEFFREY C. NELSON,
Counsel for Respondent,
the former Mary Lee Milhan.

Of Counsel:

CAVALLETTO, WEBSTER, MULLEN
& MCCAUGHEY.

EXHIBIT A.

Judgment.

Superior Court of the State of California for the County of Santa Barbara.

In re the Marriage of Petitioner, Mary Lee Milhan and Respondent, Harry Lloyd Milhan. No. 84183.

Filed March 7, 1978.

In this proceeding the court, pursuant to stipulation of the parties, entered its Interlocutory Judgment of Dissolution of Marriage on February 2, 1970, and its Final Judgment of Dissolution of Marriage on February 17, 1970. In both the Interlocutory and Final Judgments the court reserved jurisdiction to make its order with respect to division of community property and other matters.

On May 2, 1972, the court entered its Judgment Dividing Community Property and Determining Separate Property, and determined that the subject life insurance policies and Navy retired pay were Respondent's separate property. Petitioner appealed that portion of the Judgment concerning the character of those items of property.

A Remittitur was filed with the clerk of this court on January 16, 1975, after the decision of the Supreme Court of the State of California became final. Such Remittitur reversed the trial court Judgment of May 2, 1972, and directed this court to enter judgment in accordance with the Supreme Court opinion.

The above entitled action came on for hearing pursuant to Petitioner's Notice of Motions filed herein on February 20, 1976, wherein Petitioner seeks the following: entry of judgment in accordance with the Order, Judgment and Remittitur of the Supreme Court of California, restitution of pension monies received by Respondent since this court's former judgments and to which the Supreme Court held

Petitioner had a community property interest; interest on such sums; and attorneys' fees. Respondent filed a counter motion on March 5, 1976, seeking to modify child support for the minor daughter of the parties, MARGARET LISA MILHAN, born February 14, 1962. The issues raised by the foregoing motions were orally argued before the court on March 17, 1976, and April 1, 1976, the Honorable Arden T. Jensen, Judge, presiding. Thereafter both parties submitted further written argument and authorities and the matter was submitted for the court's decision.

The court issued its Memorandum of Intended Decision on March 15, 1977. The Memorandum of Intended Decision was orally argued before the court on April 11, 1977.

Petitioner MARY LEE PASLEY (MILHAN) has appeared by her counsel, Jeffrey C. Nelson of Cavalletto, Webster, Mullen & McCaughey. Respondent HARRY LLOYD MILHAN has appeared by his counsel, Gary R. Ricks of Price, Postel & Parma.

Upon appropriate proof being made to the satisfaction of the court and good cause appearing therefor:

IT IS ORDERED AND ADJUDGED THAT:

1. The Judgment entered herein on May 2, 1972, Reel #31, Judgment #22690, is hereby modified in all respects in which it is inconsistent with this Judgment.

2. Respondent's United States Navy retired pay is the community property of the parties.

3. Petitioner shall have judgment against Respondent for restitution of one-half (½) of the United States Navy retired pay received by Respondent after May 2, 1972, when judgment was entered dividing the community property. The gross amount of retired pay to which Respondent was entitled for the period from May 2, 1972, through February 1976, the month preceding the court's first hearing on the

motions herein, was Thirty-Five Thousand One Hundred Eleven and 31/100 Dollars ($35,111.31), one-half of which is Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65). Said amount shall also draw interest at the rate lawfully permitted on judgments, which interest shall be computed from January 16, 1975.

4. Execution of paragraph 3 of this Judgment shall be stayed so long as Respondent shall make payments in a minimum amount of Two Hundred Dollars ($200.00) per month toward said Judgment, which payments shall commence April 1, 1977, and be paid on the first day of each and every month thereafter for a period of five years. Execution shall order April 1, 1982, if said Judgment has not been paid in full before that date.

5. Respondent shall pay Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he was entitled for the period commencing with March 1976 and ending upon the date of this Judgment. Such sums shall also draw interest at the rate lawfully permitted on judgments.

6. Respondent shall pay to Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he is entitled as he receives payment of such benefits. Petitioner's one-half interest is currently a monthly amount of Four Hundred Thirty-six and 30/100 Dollars ($436.30). ($872.59 ÷ 2 = $436.30)

7. Petitioner shall have judgment against Respondent in the amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50), representing one-half (½) of the cash surrender value, as of the date of trial, of the National Service Life Insurance policy and the Navy Mutual Aid Association policy. Respondent shall not surrender or otherwise impair those policies in order to satisfy Peti-

tioner's (wife's) entitlement, but shall pay out of the other community property, which has been found to be adequate for such payment. Said amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50) shall likewise bear interest at the rate provided by law from January 16, 1975.

8. Execution of paragraph 7 of this Judgment shall be stayed so long as Respondent shall pay minimum monthly payments of One Hundred Dollars ($100.00) toward said Judgment, which payments shall commence April 1, 1977, and continue until payment is made in full.

9. Respondent's motion for a reduction in child support is denied.

10. Respondent shall pay to Petitioner the sum of One Thousand Five Hundred Dollars ($1,500.00) as and for attorneys' fees.

11. The court reserves jurisdiction to supervise the payment of retired pay benefits.

12. In all other respects the Judgment of this court dated May 2, 1972, remains unchanged.

Dated: March 7, 1978.

/s/ ARDEN T. JENSEN
Judge of the Superior Court

EXHIBIT B.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of Santa Barbara.

In re the Marriage of Petitioner, Mary Lee Milhan and Respondent, Harry Lloyd Milhan. No. 84183.

Filed March 7, 1978.

In this proceeding the court, pursuant to stipulation of the parties, entered its Interlocutory Judgment of Dissolution of Marriage on February 2, 1970, and its Final Judgment of Dissolution of Marriage on February 17, 1970. In both the Interlocutory and Final Judgments the court reserved jurisdiction to make its order with respect to division of community property and other matters.

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At hearings following Petitioner's motions of February 20, 1976, and Respondent's motion of March 5, 1976, evidence both oral and documentary was introduced, and the cause was submitted for decision. After deliberation, the court now makes the following findings of fact and conclusions of law in determination of all issues of fact material to the judgment of this matter:

FINDINGS OF FACT

1. As a product of his Navy service, during the course of the marriage of Petitioner and Respondent, Respondent became entitled to Navy retired pay, payments which he began receiving upon his retirement, which retirement occurred prior to the time Petitioner filed for divorce on December 27, 1968.

2. Respondent has received monthly payments of Navy retired pay since his retirement and will continue to receive such payments until the time of his death.

3. The amount of Respondent's monthly retired pay has been subject to periodic adjustments based upon changes in the cost of living.

4. Respondent has not as of yet made payment to Petitioner of any of the retired pay he has received since Petitioner filed for divorce.

5. Respondent's Navy retired pay accrued in the full gross amount of Thirty-Five Thousand One Hundred Eleven and 31/100 Dollars ($35,111.31) for the period from the court's Judgment dated May 2, 1972, through February 1976, of which Petitioner's one-half (½) interest is Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65).

6. The Navy retired pay is currently payable to Respondent in the full gross amount of Eight Hundred Seventy-two and 59/100 Dollars ($872.59), of which Petitioner's one-half (½) interest is Four Hundred Thirty-six and 30/100 Dollars ($436.30).

7. During the course of the marriage of Petitioner and Respondent, Respondent obtained from the payment of community property funds, Navy Mutual Aid Association Life Insurance Policy No. 34792, having a cash value at the date of trial of Two Thousand Two Hundred Ninety-Three Dollars ($2,293.00), and National Service Life Insurance Policy No. V-1914-27-51, having a cash value at the date of trial of Two Thousand One Hundred Ninety Dollars ($2,190.00).

8. Respondent has community property assets from which he can satisfy Petitioner's community property interest in the National Service Life Insurance and Navy

Mutual Aid Association policies, which is a sum of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50).

9. Respondent has the current ability to pay Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50) plus interest thereon for Petitioner's community property interest in the policies described in paragraph 7 above, at the rate of One Hundred Dollars ($100.00) per month on the first day of each month commencing April 1, 1977, until paid in full.

10. Respondent has the current ability to pay at least Two Hundred Dollars ($200.00) per month, commencing April 1, 1977, toward the sum of Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65) which is Petitioner's one-half (½) of the Navy retired pay which accrued between May 2, 1972, and February 1976.

11. Pursuant to this court's Judgment of May 2, 1972, Respondent was ordered to pay to Petitioner the sum of One Hundred Fifty Dollars ($150.00) per month for the support and maintenance of MARGARET LISA MILHAN. No change in circumstances has occurred that warrants a reduction in that amount.

12. It is appropriate that Respondent pay interest on the Judgment from January 16, 1975, as to retried pay Petitioner is entitled to receive and payments for Petitioner's interest in the National Service Life Insurance Policy and Navy Mutual Aid Association Policy.

13. Restitution to Petitioner of her community property share of Respondent's Navy retired pay will not be inequitable, and restitution will not result in unjust enrichment to Petitioner.

14. Petitioner incurred attorneys' fees in the above entitled matter and the reasonable value of the services per-

formed by her attorneys is no less than One Thousand Five Hundred Dollars ($1,500.00), and Respondent has the ability to pay such amount.

CONCLUSIONS OF LAW

1. Respondent's Navy retired pay is the community property of the parties.

2. Petitioner shall have judgment against Respondent for restitution of one-half (½) of the United States Navy retired pay received by Respondent after May 2, 1972, when judgment was entered dividing the community property.

3. Execution of the Judgment with respect to restitution of Petitioner's one-half (½) interest in the Navy retired pay accruing between May 2, 1972, and February 1976, which is a sum of Seventeen Thousand Five Hundred Fifty-Five and 65/100 Dollars ($17,555.65), shall be stayed so long as Respondent shall make payments in a minimum amount of Two Hundred Dollars ($200.00) per month toward said Judgment, which payments shall commence April 1, 1978, and be paid on the first day of each and every month thereafter for a period of five years. Execution shall order April 1, 1983, if said Judgment has not been paid in full before that date.

4. Respondent shall pay Petitioner one-half (½) of the gross amount of United States Navy retired pay to which he was entitled for the period commencing with March 1976 and ending upon the date of this court's Judgment and one-half (½) of the gross amount of such pay to which he is entitled as he receives payment of such benefits.

5. Restitution to Petitioner of her community property share of said retired payments will not be "inequitable" and that restitution will not result in unjust enrichment to Petitioner.

6. Respondent shall pay Petitioner the lawful rate of interest on a judgment on one-half (½) the gross amount of retired pay to which he became entitled from and after May 2, 1972, which interest shall be computed from January 16, 1975, the date the Supreme Court Remittitur was filed with the clerk of the Superior Court for all sums received before that date, and from the date of receipt for all sums to which Respondent was entitled after that date.

7. Petitioner shall have judgment against Respondent in the amount of Two Thousand Two Hundred Forty-One and 50/100 Dollars ($2,241.50); representing one-half (½) of the cash surrender value, as of the date of trial, of the National Service Life Insurance Policy and the Navy Mutual Aid Association Policy. Respondent shall not surrender or otherwise impair those policies in order to satisfy Petitioner's entitlement, but shall pay out of the other community property, which has been found to be adequate for such payment. Execution of this portion of the Judgment shall be stayed so long as Respondent shall pay minimum monthly payments of One Hundred Dollars ($100.00) toward said Judgment, which payments shall commence April 1, 1977, and continue until payment is made in full.

8. Respondent shall pay Petitioner the lawful rate of interest on a judgment on Petitioner's one-half (½) community property interest in the value of the National Service Life Insurance and Navy Mutual Aid Association policies, which interest shall be computed from January 16, 1975, the date the Supreme Court Remittitur was filed with the clerk of this court.

9. Respondent shall not be entitled to a modification of the child support payable for the support of MARGARET LISA MILHAN.

10. Respondent shall pay Petitioner the sum of One Thousand Five Hundred Dollars ($1,500.00) toward the payment of Petitioner's attorneys' fees.

Let Judgment be entered accordingly.

DATED: March 7, 1978.

/s/ ARDEN T. JENSEN
Judge of the Superior Court